FILED BY CLERK
MAY 13 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LEONARD LEE McMAHAN II, Appellant.	2 CA-CR 2009-0193 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044482

Honorable Hector E. Campoy, Judge
Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 Leonard Lee McMahan II appeals from his convictions and sentences for two counts of endangerment causing an actual risk of physical injury, one count of criminal damage, and one count each of aggravated driving under the influence of an intoxicant (DUI) and with an illegal drug or its metabolite in his system, both while his license was suspended. He argues the trial court erred in imposing an aggravated sentence based on factors not alleged by the state, in denying his motion to suppress evidence obtained from an analysis of his blood, and in refusing to instruct the jury on civil negligence. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding McMahan's convictions and sentences. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On the evening of March 6, 2004, McMahan, whose driver's license had been suspended, crashed his vehicle into a Porsche Turbo 911 coupe that was stopped in a left-turn lane. The Porsche's two occupants were not seriously injured, but the collision caused over $100,000 in damage to the car.

¶3 When police officers arrived at the scene of the accident, McMahan was being helped into a wheelchair by emergency medical personnel. He had red, watery eyes and told an officer he had taken muscle relaxants earlier that day. He was taken to a hospital, where a police officer interviewed him, noting that he smelled of alcohol. Analysis of a sample of McMahan's blood, drawn by hospital staff, showed the presence of amphetamine and methamphetamine.

¶4 A grand jury indicted McMahan for aggravated driving under the influence of an intoxicant while his license was suspended, aggravated driving with an illegal drug or its metabolite in his system while his license was suspended, criminal damage, and two counts of endangerment with a substantial risk of imminent death. After a three-day trial, the jury found him guilty of criminal damage of $10,000 or more, both counts of aggravated driving, and two counts of endangerment causing an actual risk of physical injury, lesser-included offenses of endangerment with a substantial risk of imminent death. McMahan admitted he had two prior felony convictions, and the trial court sentenced him to concurrent, enhanced, aggravated twelve-year prison terms on the criminal damage and aggravated driving counts, and to six-month jail terms—time he had already served—for both endangerment counts. This appeal followed.

Discussion

Sentencing

¶5 McMahan first asserts the trial court erred in aggravating his sentences based on its findings of financial loss to the victim, McMahan's failure to rehabilitate, his danger to the community, emotional harm to the victims, and McMahan's having committed these offenses while awaiting sentencing in another case. He argues that, because the state did not allege those aggravating factors—or any aggravating factors—before trial, the court could sentence him only to presumptive terms of imprisonment. We review challenges to the legality of a sentence de novo. *State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005).

¶6 The state did not file a notice of aggravating circumstances nor otherwise give McMahan notice it intended to prove specific aggravating factors. It did, however, include in the indictment a citation to A.R.S. § 13-702,[1] which governs the use of aggravating factors in sentencing. McMahan therefore arguably had notice he could face aggravated sentences upon conviction, although he had no explicit notice of the specific factors that might support those sentences. But McMahan never objected, at sentencing or otherwise, to the lack of notice of aggravating factors, and he therefore is precluded from obtaining appellate relief on this claim unless he demonstrates fundamental, prejudicial error. *See State v. Martinez*, 210 Ariz. 578, n.2, 115 P.3d 618, 620 n.2 (2005); *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶7 Even assuming, without deciding, that the state was required to provide notice of aggravating factors and that the indictment was insufficient to provide such notice,[2] McMahan has failed to demonstrate prejudice. We will not presume prejudice from lack of notice. *See State v. Fimbres*, 222 Ariz. 293, ¶¶ 36-37, 213 P.3d 1020, 1030 (App. 2009). And nothing in § 13-702 prohibits the trial court from sua sponte finding aggravating factors, *see State v. Marquez*, 127 Ariz. 3, 5, 617 P.2d 787, 789 (App. 1980), if it has first found that a defendant's prior felony conviction is an aggravating factor or if

[1]Significant portions of Arizona's criminal sentencing code have been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective "from and after December 31, 2008." *Id.* § 120. Unless otherwise noted, we refer to the versions of those statutes applicable at the time of McMahan's offenses. *See* 2003 Ariz. Sess. Laws, ch. 225, § 1 (former § 13-702).

[2]We do not suggest that notice of the state's intent to seek an aggravated sentence must appear in the indictment. This court has clearly held otherwise. *State v. Aleman*, 210 Ariz. 232, ¶ 23 & n.7, 109 P.3d 571, 578 & n.7 (App. 2005).

the jury finds or the defendant admits at least one other aggravating factor. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004) ("'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"), *quoting Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Martinez*, 210 Ariz. 578, ¶ 21, 115 P.3d at 624 (if single *Blakely*-compliant aggravating factor established, court may consider and find other aggravating factors to determine appropriate sentence within aggravated range).

¶8 The purpose of pretrial notice of aggravating factors is to give the defendant adequate notice of the sentence he could face upon conviction; "[a] defendant must know the extent of potential punishment he faces before he can ever decide whether to enter a guilty plea to the charge." *State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985); *see State ex rel. Smith v. Conn*, 209 Ariz. 195, ¶ 10, 98 P.3d 881, 884 (App. 2004) (applying *Waggoner*'s reasoning to permit state to amend indictment to include aggravating factors). *But see State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998) (notice of aggravating factors in state's presentencing memorandum satisfied due process where defendant pled guilty). But nothing in the record suggests the state offered McMahan a plea agreement. Indeed, the record shows otherwise—McMahan's attorney informed the trial court during a pretrial hearing that the state had not offered a plea agreement and reportedly was not inclined to do so. And McMahan has failed to explain how pretrial notice of aggravating factors would have changed his trial strategy.

¶9 A trial court properly may aggravate a sentence based on "the facts reflected in the jury verdict." *Blakely*, 542 U.S. at 303; *see Martinez*, 210 Ariz. 578, ¶ 27, 115 P.3d at 625-26 (facts implicit in verdict *Blakely*-compliant). The jury found McMahan guilty of criminal damage totaling $10,000 or more in violation of A.R.S. § 13-1602(A)(1) and (B)(1). A person commits criminal damage if he or she recklessly defaces or damages the "property of another person." § 13-1602(A)(1). The value of property damaged during the offense may be considered as an aggravating factor under § 13-702(C)(3), and financial harm to the victim is an aggravating factor under § 13-702(C)(9). The court aggravated McMahan's sentences in part due to "[t]he financial loss to the victim," a finding that falls within one or both of those subsections. Because this aggravating factor was implicit in the jury's verdict and therefore *Blakely*-compliant, the court did not err in relying on additional factors to aggravate McMahan's sentences. *See Martinez*, 210 Ariz. 578, ¶ 21, 115 P.3d at 624; *see also State v. Manzanedo*, 210 Ariz. 292, ¶ 14, 110 P.3d 1026, 1029 (App. 2005) (court may aggravate sentence based on specifically enumerated aggravating factors "regardless of whether they were more egregious than necessary to establish an element of the crimes").

Motion to Suppress Evidence

¶10 McMahan argues the trial court erred in denying his motion to suppress evidence obtained from analyzing a sample of his blood that police officers had been provided while McMahan was at the hospital following the collision. We review a trial court's denial of a motion to suppress evidence for an abuse of discretion. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008). In doing so, we consider only

the evidence presented at the suppression hearing, viewing that evidence in the light most favorable to upholding the court's ruling. *Id.* We review the court's ultimate legal conclusions de novo. *Id.*

¶11 "Normally, because any forced extraction of blood by the State invades one's expectation of privacy in bodily integrity, the intrusion is subject to the requirements of the Fourth Amendment." *State v. Quinn*, 218 Ariz. 66, ¶ 6, 178 P.3d 1190, 1192 (App. 2008). "Under Arizona law, absent express consent, police may obtain a DUI suspect's blood sample only pursuant to a valid search warrant, Arizona's implied consent law, A.R.S. § 28-1321, or the medical blood draw exception in [A.R.S.] § 28-1388(E)." *State v. Aleman*, 210 Ariz. 232, ¶ 11, 109 P.3d 571, 575 (App. 2005). The trial court found the blood draw here fell under the medical blood-draw exception described in § 28-1388(E), which provides that a law enforcement officer is entitled to a portion of any "sample of blood, urine or other bodily substance . . . taken from [a] person for any reason," if the officer "has probable cause to believe that [the] person has violated [A.R.S.] § 28-1381." In discussing the predecessor statute to § 28-1388(E), our supreme court determined that the blood sample must have been "drawn for medical purposes by medical personnel" and that exigent circumstances must be present. *State v. Cocio*, 147 Ariz. 277, 284, 709 P.2d 1336, 1345 (1985).

¶12 McMahan concedes the blood sample here was taken by medical personnel for medical purposes. But he asserts there were no exigent circumstances and the officer's request for the sample was not supported by probable cause. McMahan reasons no exigency existed because one officer testified he could have obtained a search warrant

in "30 to 45 minutes" and McMahan's blood was not drawn until seventy-five minutes after the accident, leaving officers ample time to have obtained a search warrant. Additionally, McMahan asserts the evanescent nature of intoxicants in blood samples is not meaningful because A.R.S. § 28-1381(A)(2) makes it unlawful to have an alcohol concentration of .08 or more within two hours of driving and an expert witness can determine by extrapolation what a person's alcohol concentration would have been within two hours of driving.

¶13 In *Cocio*, relying on *Schmerber v. California*, 384 U.S. 757 (1966), our supreme court found that "[t]he highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time," thus creating the exigency for obtaining the sample without a warrant. 147 Ariz. at 284, 709 P.2d at 1345. We have refused to "revisit the supreme court's holding in *Cocio* that a blood sample presents an exigent circumstance due to" the evanescent nature of alcohol in a defendant's bloodstream because we are bound by our supreme court's decisions. *Lind v. Superior Court*, 191 Ariz. 233, ¶ 20, 954 P.2d 1058, 1062 (App. 1998). And, in *Aleman*, we rejected a similar argument, finding it "clearly refut[ed]" by Arizona law.[3] 210 Ariz. 232, ¶ 14, 109 P.3d at 576. McMahan has provided no compelling reason for us to reconsider the general rule that the evanescent nature of

[3]We also find unavailing McMahan's reliance on *State v. Flannigan*, 194 Ariz. 150, 987 P.2d 127 (App. 1998). That case did not involve the statutory medical-purpose exception found in the predecessor statute to § 28-1388(E), and the officers in *Flannigan* did not act due to exigent circumstances but instead pursuant to an "untenable" departmental policy that any accident involving death or serious injury automatically created exigent circumstances. *Id.* ¶¶ 14, 25; *see also Aleman*, 210 Ariz. 232, n.5, 109 P.3d at 577 n.5 (finding *Flannigan* distinguishable).

alcohol in blood creates an exigency sufficient to justify obtaining a sample without a warrant, even had we the authority to do so.

¶14 Moreover, nothing in the record supports McMahan's assertion the police officers either could have or should have obtained a warrant in the time that elapsed before the blood draw. Most of the information the officers gathered that supported probable cause was gathered at the hospital. Nothing in the record suggests the officers failed to act promptly after determining there was probable cause to request a sample of McMahan's blood. Indeed, the officer who requested the blood draw, which occurred approximately an hour and fifteen minutes after the accident, did so after having been at the hospital for only thirty minutes—enough time to question McMahan and request the blood sample. We do not require law enforcement officers to determine a precise point at which they might have probable cause and then to cease their investigation and immediately request a warrant. *See State v. Landrum*, 112 Ariz. 555, 558, 544 P.2d 664, 667 (1976) ("'The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long.'"), *quoting Hoffa v. United States*, 385 U.S. 293, 310 (1966).

¶15 And, as the state points out, although it can prove a defendant violated § 28-1381(A)(2) by demonstrating the defendant had an alcohol concentration of .08 or greater within two hours of driving, § 28-1381(A)(1), the statute under which McMahan ultimately was charged, has no such temporal window. Rather, it requires the state to demonstrate the defendant was impaired while in actual physical control of the vehicle.

We agree with the state that extrapolation testimony "is inferior in force and quality to timely . . . test results." *See generally State v. Claybrook*, 193 Ariz. 588, ¶¶ 14-15, 975 P.2d 1101, 1103 (App. 1998) (explaining retroactive extrapolation of test results). This concern is magnified because test results in DUI cases are "virtually dispositive of guilt or innocence." *Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986). Therefore, forcing the officers to delay collecting a blood sample until they had obtained a search warrant could weaken significantly the probative force of such evidence.

¶16 Thus, as in *Aleman*, "[t]he only significant issue . . . is whether the officers had probable cause to believe that [McMahan] had violated the DUI statute at the time they requested and obtained the blood samples from the hospital." 210 Ariz. 232, ¶ 15, 109 P.3d at 576. "'Probable cause is something less than the proof needed to convict and something more than suspicions.'" *Id.*, *quoting State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (1989); *cf. Smith v. Ariz. Dep't of Transp.*, 146 Ariz. 430, 432, 706 P.2d 756, 758 (App. 1985) (probable cause does not require law enforcement "to show that the operator was in fact under the influence"; "[o]nly the probability and not a prima facie showing of intoxication is the standard for probable cause"). "In addition, probable cause exists if the collective knowledge of the officers establishes that they had 'reasonably trustworthy information of facts and circumstances which are sufficient in themselves to lead a reasonable [person] to believe an offense . . . has been committed and that the person to be arrested . . . did commit it.'" *Aleman*, 210 Ariz. 232, ¶ 15, 109 P.3d at 576,

quoting State v. Richards, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974). "We apply the law to the facts de novo in determining whether probable cause existed." *Id.*

¶17 The officers' testimony at the suppression hearing established McMahan and his vehicle smelled of alcohol; there was spilled beer in his car; his speech was slurred; he had red, watery eyes; he had difficulty answering questions because he "seemed to be involuntarily falling asleep"; and he admitted drinking alcohol and taking muscle relaxants. Moreover, McMahan recently had been involved in a serious motor vehicle accident. These facts amply support the trial court's finding that the officers had probable cause to suspect McMahan of driving under the influence of an intoxicant. McMahan's complaint that some of the officers' observations were "contradictory" is inconsequential. As noted above, we consider the collective knowledge of all the officers. *Id*. Moreover, "[i]t is the duty of the trial court to resolve any conflicts in the evidence, and where the trial court's ruling is based on substantial evidence, this court will affirm." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993). Thus, the court did not err in denying McMahan's motion to suppress evidence.

Civil Negligence Instruction

¶18 McMahan asked the trial court to instruct the jury on civil negligence in support of a theory he had been, at most, civilly negligent. The court denied McMahan's request, stating that it would not "allow the jury to speculate why this is filed as a criminal case as opposed to a civil action" and that "[t]here is nothing in this case that involves negligence." We review a trial court's refusal to give a jury instruction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995).

Although entitled to an instruction "on any theory reasonably supported by the evidence," a party is not entitled to an instruction when the law is covered adequately by other instructions. *State v. Martinez*, 196 Ariz. 451, ¶ 36, 999 P.2d 795, 804 (2000). A court may refuse an instruction if it potentially is misleading or confusing to the jury. *See State v. Rivera*, 152 Ariz. 507, 517, 733 P.2d 1090, 1100 (1987). No reversible error occurs if the jury instructions, when read as a whole, sufficiently set forth the applicable law. *State v. Barr*, 183 Ariz. 434, 442, 904 P.2d 1258, 1266 (App. 1995). And, "[t]he failure to give an instruction is not reversible error unless it is prejudicial to the defendant and the prejudice appears in the record." *State v. Rosas-Hernandez*, 202 Ariz. 212, ¶ 31, 42 P.3d 1177, 1185 (App. 2002).

¶19 The trial court properly refused the instruction concerning civil negligence because of its potential to mislead or confuse the jury, whose task was to determine McMahan's criminal culpability, not his civil liability. And the court instructed the jury correctly on the criminal offenses with which McMahan was charged, on the culpable mental state of recklessness, and on the jury's duty to find all the elements of the crimes proven beyond a reasonable doubt. *See* A.R.S. §§ 13-105(10)(c) (defining "recklessly"), 13-1201(A) (endangerment), 13-1602(A) (criminal damage); *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995) (reasonable doubt instruction). Thus, the instructions as a whole sufficiently set forth the applicable law.

¶20 McMahan asserts, however, that, because Division One of this court found a comparison of civil negligence and criminal recklessness useful in *In re William G.*, 192 Ariz. 208, 963 P.2d 287 (App. 1997), "[i]t follows that an instruction on civil

negligence would have aided the jury in the present case . . . as well." But nothing in *William G.* suggests that the legal definition of criminal recklessness is vague or insufficient or that an understanding of civil negligence is necessary for a jury to understand the definition of criminal recklessness. *See* 192 Ariz. at 213-15, 963 P.2d at 292-95. In any event, McMahan was free to argue to the jury, as he did, that he had been merely civilly negligent in causing the accident. Based on this record, we cannot conclude that the trial court abused its discretion in declining McMahan's proffered instruction on civil negligence or that he was prejudiced as a result.

Disposition

¶21 For the reasons stated, we affirm McMahan's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge